No. 55104-3-I

DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

RUD OKESON, DORIS BURNS, WALTER L. WILLIAMS and ARTHUR T. LANE, individually and on behalf of the class of all persons similarly situated,

Respondents,

vs.

THE CITY OF SEATTLE,

Appellant.

BRIEF OF APPELLANT, THE CITY OF SEATTLE ON ONE PERCENT FOR ART

THOMAS A. CARR
Seattle City Attorney

William H. Patton, WSBA #5771
Rebecca C. Earnest, WSBA # 13478
Assistant City Attorneys
Attorneys for Appellant
The City of Seattle

Seattle City Attorney's Office
600 – 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

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This appeal is from a bench trial conducted in two phases in April-June 2004. By stipulation, the only issue being appealed[1] is the decision on the City's One Percent for Art program, which is funded by capital improvement projects of City departments. First, the court, without giving a basis, invalidated Seattle's 30-year-old art ordinance, as applied to the City Light department. Second, the trial court allowed City Light to continue funding art, but only within narrowly drawn guidelines that reject much of Seattle's uncontroverted evidence of the utility's purposes.

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Ordinance partly invalidated

1. The trial court erred in declaring that Seattle's One Percent for Art ordinance (SMC 20.32.010-.050), enacted in 1973, is invalid as applied to City Light. Conclusion of Law 11 (App A); Judgment ¶¶ 2.A-2.B (App B).

1a. The trial court erred in requiring City Light to take back money already paid to the Municipal Art Fund for City Light's

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[1] One issue, involving Sound Transit, had been stayed for later decision. Subsequently, the trial court has permitted plaintiffs to supplement their already amended complaint to add an issue involving biodiesel fuel. The biodiesel fuel add-on is the subject of the City's separate motion for discretionary review in this Court (No. 55800-5-I).

benefit. Conclusion of Law 10; Judgment ¶ 2 and Exhibit E ¶ 6.

2. City Light art restricted

2. The trial court erred in limiting City Light funds to art projects having a restrictively interpreted "'close' nexus to the utility's primary purpose of furnishing electricity to its ratepayers." Conclusions of Law 11, 14; Judgment ¶ 2.C.

2a. The trial court erred in finding that much of the City Light money spent by the Office of Arts and Cultural Affairs during 2000-2003 was "spent to benefit the general public, not City Light ratepayers." Finding of Fact 50.

2b. The trial court erred in finding that the majority of City Light funds spent on art projects in 2000-2003 were spent on art purchases or projects "with a general governmental purpose, rather than a legitimate utility purpose"; and in choosing which specific art falls in each category. Finding of Fact 51; Order Denying Summary Judgment [on One Percent for Art] at 4.

2c. The trial court erred in requiring that art owned by City Light be displayed only in City Light offices or on its property, or stored, rented, or sold; and in restricting City Light's ability to lend art. Conclusion of Law 9; Judgment ¶ 2 and Exhibit E ¶¶ 2-3.

2d. The trial court erred in narrowly defining the

specific purposes for which City Light may purchase art and prohibiting expenditures on art that has a primary purpose of improving City Light's image in a particular place, or cultivating public relations; or mitigating a substation's appearance if the primary purpose of the art is to provide artistic benefit to the surrounding neighborhood and the public as a whole. Conclusion of Law 9; Order Denying Summary Judgment at 4.

2e. The trial court erred in first leaving for further factual determination the question whether City Light, as a monopoly in its area of service, may use art as advertising, but then making no applicable findings of fact or conclusions of law after trial. Order Denying Summary Judgment at 4; Findings and Conclusions generally.

2f. The trial court erred in replacing decisions by City Light, working with the Office of Arts and Cultural Affairs, with the trial court's own opinions on whether art sufficiently educates the public about conservation. Conclusion of Law 9.

2g. The trial court erred in requiring City Light to sell art assets that the court determined were "impermissibly" owned by City Light. Conclusion of Law 10; Judgment ¶ 2 and Exhibit E ¶¶ 4-5.

B. Issues Pertaining to Assignments of Error

1. Invalidation of ordinance

1. When a first class charter city's legislative decisions are entitled to deference, may a trial court reject that rule to invalidate a City

ordinance as applied to only one City department, while still permitting that department to engage in the same function? Assignment of Error 1.

2. May a trial court invalidate an ordinance of a first class charter city without making any finding of fact or reaching any conclusion of law identifying a reason for the decision, much less a legal standard for the decision? Assignment of Error 1.

3. Is the *Okeson* distinction between payment for a public benefit such as streetlights, and payment for services directly benefiting ratepayers, appropriate for deciding which general City policies apply to all departments, including utilities? Assignments of Error 1, 1a, 2, 2a-d, g.

4. Did the trial court have a reasoned basis for requiring that City Light funds held in the Municipal Art Fund for later expenditures on City Light art be paid to the Light fund? Assignment of Error 1a.

2. Restriction on use of art

5. When the court has determined that art may have a utility purpose, may it override evidence of decisions made by City Light in consultation with the City's Office of Arts and Cultural Affairs about what is in the utility's interest? Assignments of Error 2, 2a-b, 2d, f-g.

6. Did the trial court demonstrate a reasoned basis for analyzing art chosen for a conservation or educational message and rejecting the unrefuted testimony on whether the art adequately meets City Light's stated purposes? Assignments of Error 2, 2a-b, f.

7. Did the trial court too narrowly interpret "where City Light does business" and thus may display art? Assignments of Error 2c, 2g.

8. Did the trial court erroneously leave for further factural determination the question whether advertising serves a proprietary function when City Light is a monopoly in its territory, then fail to make a decision on advertising after trial? Assignment of Error 2e.

9. Did the trial court show any basis for deciding that City Light may not use art to serve a public relations function, where the evidentiary record shows that "public relations" was used to mean serving educational and conservation purposes and the court held at least the latter was permissible? Assignments of Error 2d, 2f.

10. Did the trial court show a basis for determining that City Light may not use art to mitigate the appearance of a substation if the art is not placed on the substation structure or site? Assignment of Error 2d.

11. Even if City Light's decisions on using art may be restricted, did the trial court too narrowly interpret how art may serve a utility purpose, including the court's adoption of a narrow "close nexus" standard unsupported by existing law? Assignments of Error 2, 2a-g.

II. STATEMENT OF THE CASE

A. History leading to trial

1. Before the Supreme Court *Okeson* decision

This case has a convoluted history. On February 14, 2002, plaintiffs filed a Complaint for Declaratory and Injunctive Relief and Damages. CP 3-21. That complaint was devoted almost totally to whether streetlights could be charged to utility ratepayers, which the Washington Supreme Court decided separately[2] without mentioning remedies. Plaintiffs also alleged that the City of Seattle used Seattle City Light as a "cash cow," requiring City Light to pay various inter-departmental fees and charges that exceeded the true and full value of services rendered to or property transferred to City Light, violating RCW 43.09.210 (App C) and other laws. CP 6-7 ¶¶ 5-6.

Seattle's motion for partial summary judgment dismissing the cash cow allegation was stayed until 60 days after the *Okeson* decision. CP 613-615. A large part of Seattle's motion was devoted to the argument that plaintiffs lacked a private right of action under RCW 43.09.210. CP 310-311, 818, 319-326. The trial court, while staying the hearing, determined that "plaintiffs may properly proceed under RCW 80.04.440." CP 614. Seattle later stipulated to not appealing this decision. CP 1636-1637.

After the *Okeson* decision, plaintiffs moved to amend their complaint to add more specific allegations of violation of RCW 43.09.210 and

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[2] *Okeson v. Seattle,* 150 Wn.2d 540, 78 P.3d 1279 (2003)

seek detailed streetlight remedies. CP 620-627. The proposed amendment also added an entirely separate subject relating to Sound Transit. CP 621. This motion was granted, CP 815-816, despite the court's prior ruling that barred discovery of Sound Transit issues because the City has a "statutorily imposed obligation to move its utilities, at its own expense, to accommodate Sound Transit's construction." CP 651-652. The Sound Transit issue was, however, stayed for separate trial. CP 816.

2. General government function theory added

In a supplemental brief opposing Seattle's still-pending June 2003 motion on cash cow allegations, plaintiffs raised, in reliance on *Okeson* argument that a number of the services for which City Light paid other departments of the City were "general governmental functions." CP 682-697 at 687-688. The trial court later denied Seattle's motion. CP 809-811.

As a result of plaintiffs' new "general government" allegations, as raised in their supplemental brief and recently disclosed expert opinions, *e.g.,* CP 828, 829, 834-835, Seattle filed two separate motions for partial summary judgment. One was a motion on all but one of the disclosed general government issues. CP 955-976. The Court denied this motion. Decisions on these issues are not being appealed.

3. Summary judgment motion: One Percent for Art

The second motion was devoted solely to the City's One Percent for Art ordinance (App D), which applies to all City departments having

capital improvement projects, including City Light. CP 1808-1831.

The motion was supported in part by the declaration of James Ritch, then acting superintendent of City Light. Because of the nature of the court's later judgment, part of his testimony is relevant to this appeal. He testified that City Light's power stations, utility poles, hatch covers, and overhead wires are necessary facilities to run a utility. City Light wishes to be community-friendly by mitigating the impact of its facilities on the urban environment, including through the use of art at or near City Light facilities. CP 818 ¶ 3, 821 ¶ 12. City Light believes it is necessary to advertise and cultivate public relations for several reasons, including educating the public about energy efficiency and conservation, having an informed customer base and citizenry because the utility is "owned" by the citizens, and maintaining a cooperative relationship with customers.

He said the use of artwork carries out these goals. CP 821-822 ¶ 13. For example, during the 2000-2001 energy crisis, City Light had an aggressive program of energy conservation, which it advertised by radio in conjunction with the Mariners' season, believing it would be an efficient way to reach a large number of consumers. CP 820-822 ¶ 10.

The City argued that City Light, in carrying out the City's One Percent for Art ordinance, was appropriately conducting its proprietary business under RCW 35.92.050 (App E) and *Tacoma v. Taxpayers,* 108 Wn.2d 679, 694, 743 P.2d 793 (1987). The City contrasted opinions of

plaintiffs' experts Robert Brooks and Carol Opatrny. Ms. Opatrny testified that art is "a nonutility related expense. For that reason, I don't think that Seattle City Light should pick up art related costs." CP 830:4-7. She was unable to think of a utility purpose for art, including the design of hatch covers or a substation design that incorporated a mural or "sculpturing." *E.g.,* CP 826, 827:1-8, 828:15-829:2. Mr. Brooks's deposition testimony was similar. *E.g.,* CP 833, 834:14-835:21.

In opposition, plaintiffs did not provide any declarations refuting any utility purpose for art identified by City employees. Plaintiffs argued that the issue was whether the One Percent program was for a general governmental purpose or a utility purpose authorized by RCW 35.92.050. CP 1284.

Plaintiffs identifed four issues: (1) utility benefit, (2) authority to expend utility funds on art under RCW 35.92.050, (3) whether one percent "exceed[s] the boundaries of that implied authority," and (4) "factual issues concerning the utility purpose of specific projects, as well as the reasonableness of the total amount Seattle requires City Light to spend on public art each year . . . ." CP 1297.

In reply, Seattle repeated that determining whether the One Percent for Art program is a general governmental function is an issue of law, not of fact. CP 1308-1309. Seattle argued: "The only question before this Court is whether City Light has forged a reasonably close nexus between

its art-buying and its business, such that it could not be said that City Light is behaving in an arbitrary and capricious manner." CP 1309.[3]

The court denied the City's motion, but ruled as a matter of law on several points, set out in full in Appendix F, including public relations, conservation education, and where City Light does business. CP 1335-1339 at 1338. The trial court also identified a genuine issue of material fact and further factual determinations needed in the areas of advertising, mitigation, and the one-percent limit. App F. CP 1338.

B. First phase of trial: Is art a governmental function?

The cash cow issues were tried to the Court in two phases. The first took place April 15 – May 3, 2004. CP 1566. Besides streetlight remedies, this phase addressed the issue of law,[4] whether various services for which City Light shared costs with other City departments were general governmental services that did not serve the purpose of an electric utility, therefore making it improper under *Okeson* to charge City Light a proportional departmental share. *Id.* A major share of this phase was devoted to One Percent for Art. Before testimony, the court granted

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[3] Plaintiffs also filed a supplemental brief arguing a 1978 case they identified as "controlling," as well as relying on WUTC materials. CP 1313-1316, 1318-1334. The court considered these additional materials. CP 1338 item 7.

[4] While plaintiffs had requested a jury, the Court decided in a preliminary hearing on April 12 that the question of what was governmental versus proprietary would be tried to the court. The decision is reflected at RP 4/15 10:14-17.

Seattle's motion for reconsideration of the court's summary judgment decision on the use of art in advertising and public relations, ordering that both issues be tried. CP 1443-1444; CP 1454-1456; RP 4/15 9:22-10:5.

Plaintiffs took the position that "all of the art should be thrown out wholesale . . . ." RP 4/15 10:8. Plaintiffs stated that the court should, in Phase I, "view the evidence through . . . three kinds of legal lenses . . . ." RP 4/15 15:9-11. These are "the accountancy statute," the cases that "stand for the principle that in order for a utility to make a given kind of expenditure which can be passed on to ratepayers, it has to have a close nexus, I think the cases say a sufficiently close nexus to the furnishing of electricity," and "the Covell test that's discussed . . . in the Okeson case" . . . to decide whether a given kind of charge should be viewed as a tax or a fee . . . ." RP 4/15 15:9-16:9.

The City stated that under *Tacoma v. Taxpayers,* "the same standard that would apply to a private company" applies here. Thus, "there's a wide latitude given to the City in terms of determining how to run that utility." RP 4/15 183-4, 11-20. The City concluded: unless the "policy choices . . . can be seen . . . to be arbitrary and capricious or unreasonable, they must be affirmed." RP 4/15 21:18-21.

No named plaintiff or other member of the class testified on non-streetlight issues. Plaintiffs called Barbara Goldstein, director of the City's Public Art Program for the Office of Arts and Cultural Affairs (Art

Office), as their only art witness. RP 4/15 53:23, 54:8-9. Using web pages, plaintiffs questioned her on the mission of the Public Art Program. She testified at RP 4/15 59:20-60:10:

> The program that I manage is the Public Art Program, which has a very specific, dedicated funding source, and that is One Percent for Art from capital construction projects. Because my . . . program has its own distinct funding source, it has to have its own set of standard operating procedures and its own mission, which is responsive to the funding source it derives from. . . .
> Our mission is concerned with creating visual arts experiences for the people of Seattle, and it is connected specifically with construction projects that the City does.

Ms. Goldstein testified further: "We have to pay attention to the specific ways that our program is funded, and so a lot of times our projects are targeted to specific elements of our funding." RP 4/15 61:3-8.

She said, "We continue to provide visual arts amenities to connect with capital construction projects and construction that the City is doing." RP 4/15 66:20-67:1. She testified that the mission of the Public Art Program "hasn't changed since 1973 when the program was initiated." RP 4/15 67:15-22. Ms. Goldstein addressed the program's funding sources:

> Percent for Art funds could come from capital construction that's funded by ratepayers . . . . Every funding source has a unique set of restrictions that are placed on it. We also have a separate line of funding for maintaining public art, and so every funding source that we have we have to . . . monitor in a very

unique way.

RP 4/15 68:6-15.

Ms. Goldstein also addressed the process of choosing projects:

> Every year . . . I meet with the liaison from the other City department to determine what would be the most appropriate use of the funds that come from their Percent for Art. We talk about what type of projects they're embarking on and what types of art enhancements would best suit their needs as an agency . . . .We then develop a draft plan, which is reviewed . . . by the other City department, and that plan outlines a broad scope of work that we will pursue for each art project, outlines how the artists will be selected, outlines how much money will go into it. That document then [is] shown and reviewed by the other City department….

RP 4/15 69:2-18.

The Municipal Art Plan for 2001-2002 (App G) "represents all the projects for all the departments that contribute money to the Municipal Art Fund . . . ." RP 4/15 102:18-103:10; Ex 45. She testified that under the Municipal Art Plan, some projects "could be completed in the course of two or three months, another one might take five or six years." RP 4/15 70:6-7, 17-25. She said City Light also pays "collection management expenditures." These cover "what it costs us to . . . install, move, or clean artworks that are in the City Light collection . . . . RP 4/15 78:23-79:7.

Ms. Goldstein testified that part of the City Light collection is the Portable Works Collection: "We've been collecting portable works for City Light since about 1974, and we have approximately 3,000 small-scale

artworks in our collection.[5] Those works are placed in City facilities where City Light does business." RP 4/15 93:10-16. The curator "works with the employees of any given floor of a building . . . ." RP 4/15 96:16-20. The delegation of employees get to look at the collection to place art work. RP 4/15 97:4-19. Ms. Goldstein testified that City departments are not restricted to their own art: "City Light does business all over the city, so . . . their work may be shown, say, in the law department, because the law department does work with City Light, and work that was acquired from the Parks Department or the Water Department might find its way on to the walls of City Light." RP 4/15 98:18-24.

Plaintiffs then turned to examining specific City Light art projects. Space allows only a sampling here. The reasoning applied to the Urban Collaboration project (App G at 10), which was begun in 1994, is typical. Ms. Goldstein said, ". . . this is a project where City Light's director of communications was part of the selection panel, and City Light was very involved in deciding that this would be a project that they would want to fund. . . . [T]he utility's purpose here is to build a strong relationship between City Light and the communities that it serves." RP 4/15 105:1-5, 19-25. She distinguished communities from neighborhoods: " . . . a neighborhood is a place that has a physical boundary. Community might be a

[5] These are the total collection; City Light owns about 1,500. RP 4/15 123:15-18.

particular group of people." RP 4/15 118:7-8. Ms. Goldstein said a project such as Urban Collaboration "helps to . . . mitigate the impact of the development that's taking place in South Lake Union and Cascade, which City Light is a significant part," RP 4/15 107:12, 108:1-2, 6-9, explaining:

> . . . a lot of people don't like having substations . . . and . . . major pieces of industrial infrastructure in their neighborhoods, and so it's always been our approach that it's important to help to create a better – first of all, to help City Light to make better-looking infrastructure, but also to show that they're a good neighbor that actually creates nice physical things in the neighborhoods that they're going to go in and put substations.

RP 4/15 108:11-20.

The court found that Urban Collaboration lacked a sufficient utility nexus. CP 1581 ¶ 51.

Ms. Goldstein testified that some pieces serve to mitigate the ugly infrastructure as well as provide a more pleasant work environment for City Light people, *e.g.,* the Electric Gallery, on a Western Avenue substation. RP 4/19 49:6-14, Ex 62 (App H). A project may be on substation grounds but accessible to the public. *E.g.,* Creston Nelson Substation project. RP 4/19 53:6-58:16, Ex 269 (App I). The court ruled that these two do have a sufficient utility nexus. CP 1581-1582 ¶ 51.

Ms. Goldstein said other lighted pieces are near City Light property, *e.g.,* Wave Rave Cave, RP 4/19 70:2-23, Ex 67, 282 (App J). Wave Rave Cave is next to, but not upon, a City Light vacant lot bought

for substation use; the art project is under Hwy 99 in a dark place that Belltown people thought was dangerous. The art is lit with low energy, high intensity lights and is now a little more pleasant. RP 4/19 70:10-23. The court ruled this piece had an insufficient utility nexus. CP 1581 ¶ 51.

Ms. Goldstein said a conservation message may be incorporated into the project. *E.g.,* Skagit Streaming. RP 4/19 75:5-77:15, 79:3-80:13, 94:7-96:6, Ex 72 (App K). The project powered video cams with fiber optic cables placed in the Skagit for various purposes, "to capture the life of the salmon and the wildlife surrounding the aggregate ponds" and brought it "back to the public so that the public would have a sense of what the . . . impact of the dam was on the wildlife in the area." RP 4/19 76:10-21. She testified that the "piece was intended to be displayed in a variety of different settings. One was downtown . . . within sight of . . . Elliott Bay, where people that are ordinary ratepayers or citizens that are going by could see something about the relationship between the dam and the nature and the city." RP 4/19 76:22-77:2. This portrayal was "on the Bon Marche parking garage" from dusk till about midnight and included the cite to the Skagit Streaming website. RP 4/19 80:2-5, 79:16-21.

In addition to this portrayal, Ms. Goldstein said, the "other location is on a website . . . and it has links from both our [art] website and Seattle City Light's website, and that particular element of the piece has a tremendous amount of information about the Endangered Species Act,

salmon – life cycle of salmon, and a number of issues that City Light has been concerned with as it builds and runs the hydroelectric facilities." RP 4/19 77:3-10. Finally, Skagit Streaming "was displayed . . . in the lobby of City Hall on a monitor so that people . . . like City Council people that are making decisions about the environment and about electricity could see it every day as they went in and out of the building." RP 4/19 77:11-15. The trial court later made a split decision on this project, ruling the website had a sufficient utility nexus, but the municipal building lobby video and downtown parking garage projections did not. CP 1581-1582 ¶ 51.

Ms. Goldstein said that some art projects are on other public property, *e.g.,* Dreaming in Color, at Seattle Center's McCaw Hall. RP 4/19 100:16-102:22, 103:4-10; Ex 279, 288 (App L). The piece "won a National Lumen award for the use of light." RP 4/20 19:6-9. It "is a light sculpture that is the entrance to Marion Oliver McCaw Hall from Mercer Street." RP 4/19 100:23-101-5, 101:23-102:5, Ex 59. Development of a brochure explaining the low-energy light nature of the project was suspended pending the outcome of this litigation. RP 4/20 19:3-8. Its plaque will be corrected to credit City Light and its brochure will be created post-litigation. RP 4/19 102:6-18. The court ruled that Dreaming in Color had an insufficient utility nexus. CP 1581-1582 ¶ 51.

Ms. Goldstein testified that other art resulting from City Light's Percent for Art funds are in other City offices. *E.g.,* Killer Whale Crest

Hat and the Speaker Stick, in the lobby of the Mayor's office, RP 4/19 109:24-110:4, 112:1-7, 4/21 134:18-135:21, Ex 280, 346 (App M); or art in the Alaska Building, where senior citizens come to the Senior Citizens Office "for advice about a variety of different things . . . ," RP 4/19 145:2-5. City Light portable art is hung "in places that are accessible to the public," and "in places where City Light either has its offices or where it does business." RP 4/19 157:10-21; see also 158:13-15, 158:21-159:13. One example was the City personnel office, in the Dexter Horton building, which serves City Light. RP 4/19 146: 5-7. The court ruled that City Light could not fund art displayed away from its own facilities. CP 1584 ¶ 9.

Ms. Goldstein testified that portable art may also be in the art depot, where art moves in and out. RP 4/19 142:4-22. About 90 percent of city departmental portable art is on display at any one time. There is "a huge demand from the employees that worked in the various departments to have more art placed on their walls." RP 4/19 161:16-19, 162:4-12. One piece that City Light purchased for $50,000 was sold for $254,000 with the Dexter Horton Building, because it could not be removed; the money was returned to the City Light Percent for Art Fund. RP 4/19 156:2-157:9.

Ms. Goldstein also testified that when City projects are announced, such as a . . . substation, "we get a call from the community representative . . . saying . . . we know that the City has a Percent for Art, what are you

going to do for us . . . to basically offfset that." RP 4/19 169:21-170:9. She said "the North Service Center was a response to that . . . because the Licton Springs Community . . . were putting strong demands on City Light that they make that a more attractive facility." RP 4/19 170:13-18.

She testified further that "the Public Art Program in Seattle is extremely well known. It's considered to be a national model." RP 4/19 172:24-173:1. At the time of testimony, Ms. Goldstein had been in her position for 10 years. RP 4/15 54:7-12. She came from Los Angeles, which had such a program that also included the utilities. RP 4/19:2-23.

She testified that her understanding for expenditures of City Light Percent for Art funds came from meeting with people in the City, going through the history of legal opinions, and meeting with the Law Department. RP 4/20 4:18-24. "The guidelines that we gave for the expenditure of City Light Percent for Art funds were laid out in communications between City Attorneys 'York and Baylor' [*sic;* Jorgen Bader] and the Attorney General and City Attorney Gordy Davidson." RP 4/20 4:22-5:3. She testified to her understanding:

> And there were a number of different purposes that were laid out in legal opinions. One was that the funds could be used to improve the working environment for City Light and its workers and places where City Light did business.
>
> Another was to be able to mitigate the impact of City Light facilities on the surrounding communities. Another was educating the public about the work that

> the City Light did and utilities issues. And a fourth one was building positive public relations between City Light and the communities it served. We tried to keep it in those guidelines….

RP 4/20 5:1-12.

Ms. Goldstein referenced Ex 274 (App N), a letter from an assistant attorney general, as one thing she reviewed. RP 4/20 5:14-20, 6:20-7:24. Asked to addressing the writer's expressed concern that "it is easy to lose track of the standards and to think of the utility funds as merely another source of financial support for . . . art as a general government purpose" (Ex. 274 at 2), she testified:

> We make sure that the work has a nexus with either the location of projects that City Light is doing, that it has a clear utilities purpose and that it demonstrates the use of light or sustainability, or that it results in some kind of an object that goes into the City Light Portable Works Collection.
>
> We also work with City Light . . . to develop our Municipal Art Plan and make sure that it complies with their understanding of what they would like to see us do. And if they ask us not to do something, we cancel it or postpone it, and that happens very frequently.

RP 4/20 47:3-24.

Ms. Goldstein next testified to how several art programs fit into her understanding of the permissible bounds of City Light expenditures on art: *e.g.,* Artist in Residence Programs, Skagit Streaming, Wave Rave Cave, Temple of Power (App O), and Oculus Portals (App O). RP 4/20 9:6-11:4.

She explained others beginning at RP 4/20 19:14, including the Speaker Stick, now in the Mayor's reception area, where City Light does a lot of business, saying, "City Light and the Mayor's Office are involved with the tribal communities quite a bit around environmental issues . . . ." RP 4/20 29:9-24. Mr. Ritch also testified on the Speaker Stick. RP 4/21 137:12-23.

Ms. Goldstein testified that in some cases (*e.g.,* testimony at RP 4/20 12:8-13:10, 13:22-15:19), City Light and its employees performed work, such as installation of Wave Rave Cave, on top of the Percent for Art funds because certain projects "really helped advance their educational goals . . . ." RP 4/20 13:7. She said City Light has been willing to put effort and in-kind support or funds into adding to projects. RP 4/20 32:18-23. In her experience, City Light has voluntarily spent more than one percent on art. RP 4/20 33:16-18.

Dwight Dively, Director of Finance for the City of Seattle for 10 years, testified that other cities allocate up to 2.5 percent for art. RP 4/28-I 15:17-16:1, 4/28-II 4:14-25.[6] He testified that he sees three different benefits to City Light in the One Percent program: first, " . . . the portable art, is displayed in the City Light's offices where it's accessible to the

[6] Because of tape transcription difficulties, the April 28 and May 3 transcripts are in two sections filed on different dates, cited as 4/28-I and 4/28-II, and 5/3-I-I and 5/3-II.

citizens and to the employees, which is something that improves the working environment"; second, " . . . where the art is part of a facility . . . it becomes a more attractive part and more acceptable part of a community . . . . By being able to put art into them . . . certainly reduces community resistance . . ."; ". . . a third benefit, . . . more generally, is to City Light's customer base, the people who live in the City and purchase services from City Light by having that art in the community in these various locations . . . ." RP 4/28-I 34:15-35:10, 4/28-II 4:9-13.

Gary Zarker was Superintendent of City Light for eight years, until May 2003. RP 5/3-I 4:11-5:1. He testified: "There are multiple ways that I think City Light benefited from the One Percent program." RP 5/3-II 18:14-15. He included "mitigation," saying that . . . "the electrical system is not just substations and generation plants. It's a machine that includes the wires that connect to your house and mine, and that investment, along corridors, along neighborhood streets, is a community impact that I think isn't lost on those who get to enjoy the construction activities that occur on those streets." RP 5/3-II 18:16-19:2.

Mr. Zarker testified that as another benefit, "a portion of it helps convey some of the program messages that the utility is pursuing, conservation, environmental issues, salmon protection, green power opportunities, raising public awareness of those services that are a part of the utility's program." RP 5/3-II 19:15-20. Also, his "impression is that

the vast majority of the employees of the utility are pleased to have that service. They enjoy having the art on their walls . . . .” RP 5/3-II 19:23-25.

Mr. Zarker mentioned the “salmon program” as one instance in which City Light spent money beyond the One Percent program, saying: “we through surveys had found that the considerable investment that City Light invested in recovering salmon stock on the Skagit River, something absolutely vital to the future of those generation plants and the utility, was not well understood by the general public or ratepayers, and . . . the particular artwork . . . needed to have additional money to project it in the location they were going to do it in downtown.” RP 5/3-II 21:2-16.

Finally, Mr. Zarker testified that City Light advertises to “promote the programs, largely conservation. We had a green power program . . . . People need to be aware of what those options are . . . .” RP 5/3-II 24:11-17. He also spoke on the benefit of public relations to City Light, in part:

> I think one of the fundamental premises of a public utility is that the citizenry is involved and is knowledgeable enough about complicated issues to help the utility make decisions about the future of the service we provide. Helping people understand complex issues often is a public relations function that is highly appropriate. It is very controversial within the utility, and within the City sometimes, as to how much should you spend on something like that. But if it does provide for a more informed citizen owner, the utility found that to be very useful.

RP 5/3-II 24:22-25:17.

Margaret Pageler, a lawyer who served for 12 years on the Seattle

City Council and had major committee responsibility for City Light, testified by deposition. CP 1587 ¶ 7; 1462:11-1464:2. She testified that "the rules and regulations that apply to city departments with respect to contractors, employment and so forth also apply to the city utilities." CP 1464:17-22. She said, "I think that City Light is a department of the city and that policies that apply to city departments also apply to City Light and Seattle Public Utilities." CP 1478:10-12. She compared the City program with the state's and other cities' programs. CP 1478:14-18. She gave examples of other City policies that apply to City Light: "city projects will be built to green standards. That raises the costs . . . . We used to have WMBE requirements which probably, who knows, may have raised the costs. . . . We have a requirement that contractors . . . have to verify that they provide health benefits for domestic partners . . . . We have a number of standards that any of our component agencies must comply with." CP 1478:19-1479:12.

Ms. Pageler also "would advocate that [art] be displayed in places like the mayor's office where there are more likely to be City Light customers . . . , neighborhood service centers, those kinds of places." CP 1500:24-1501:3. She testified that "one percent for arts is the ceiling on contribution to public art in connection with capital projects, not only for the utilities but for all city projects." CP 1477:18-20. She believed that "when you have a facility that you have to build . . . , if there's no cap on

the expenditure for mitigation and amenities, . . . the community can force enormous expenditures. And I've seen it time and time again with the utilities . . . because you've got to get the utility infrastructure built." CP 1502:15-24.

During closing argument, Mr. Jurca stated that the way the art program is set up "couldn't, in our view, be a more obvious kind of tax on the utility . . . ." RP 5/5 45:5-10. He then deferred to Ms. Divine to discuss art, who stated that "we do have a problem with the entire 1 percent art program . . . ." RP 5/5 46:20-21. The judge interrupted to state her position: "You don't really need to address that, because I tend to agree with that . . . ." RP 5/5 46:22-23. The judge also said that beautifying the employee work environment and customer service areas were legitimate utility purposes, but she was interested in art at substations "where the art is primarily being used to mitigate the unattractiveness of the substation or of the facility." RP 5/5 47:5-16.

Ms. Divine stated that "we start out with the evil of the program being this 1 percent fee, the tax, that creates this huge pool of money that then the public art program figures out how to spend, and they try to come up with a rationale to connect it to a utility purpose, but that's not the primary function." RP 5/5 47:20-25. While she conceded that City Light has "the right to make their facilities attractive as part of the facility," RP 5/5 48:8-11, she argued that artwork outside on the grounds is not a

"proper proprietary utility function." RP 5/5 48:17-23.

Mr. Patton, arguing for the City, pointed out that City Light is part of the City of Seattle: " . . . the City is a corporation that is a first-class charter city organized under the laws of the State of Washington . . . . He stated that City Light "is subject to general City requirements for many things," *e.g.,* the Civil Service program, the personnel ordinance, the health benefit requirement related to construction contracts. RP 5/5 80:9-81:14. He stated: " . . . the One Percent for Arts program . . . [is] a generic requirement of the City that applies across the board." RP 5/5 83:22-25. Finally, he argued that without the limit of one percent, City Light could be exposed to community demands for greater art expenditures. RP 5/5 87:20-88:18.

Findings of Fact and Conclusions of Law for the Phase I trial were entered on May 21, 2004, including those relevant to art, CP 1567-1568 ¶¶ 1-4, and specifically addressing art, CP 1579-1582 ¶¶ 45-51, and CP 1582-1585 ¶¶ 1-3, 9-11. Neither advertising nor education (beyond conservation) was mentioned. The remedy was reserved to the end of Phase II. CP 1585 ¶ 13. Seattle contends that Findings of Fact 50 and 51 (App A), which find a purpose of benefiting the public and serving a general governmental purpose rather than a utility purpose, are erroneous.

Seattle further contends that Conclusion of Law 11 (App A), invalidating the One Percent for Art ordinance as applied to City Light, is

erroneous. Seattle also contends that Conclusion of Law 9 stating detailed limits on City Light's purchases and use of art, and prohibiting the use of art in "cultivating public relations" but failing to address the reopened question of advertising, is erroneous. Last, Seattle contends that Conclusion of Law 10, addressing remedies, is erroneous.

C. After the art trial

The second phase of the trial began on June 7. It was devoted to plaintiffs' allegations that, under RCW 43.09.210, other departments charged City Light excessive costs. Art was not directly addressed.

Based on the trial court's Phase I findings and conclusions, on July 28, 2004 the parties entered into a Stipulation Regarding One Percent for Art Remedies. CP 1590-1597. Under the stipulation, if the trial court is upheld, "impermissible art" will be transferred to other ownership. In that event, City Light will be reimbursed $941,312 plus interest, plus another $354,633.42 in City Light contributions held in the Municipal Art Fund but not yet expended. CP 1593 ¶¶ 5-6, 1596-1597.

On September 28, the Court entered Phase II Findings of Fact and Conclusions of Law nunc pro tunc August 18, 2004. CP 1598:15-18. Under the parties' Stipulation Waiving Appeal Except on Art Rulings (CP 1636-1637), entered on October 8, none of these is the subject of appeal.

Partial Judgment Pursuant to CR 54(b) on Phases I and II was entered on October 8. CP 1598-1635 (App B). The judgment incorporated

the parties' stipulation on art matters as Ex E. CP 1602 ¶ 2. The City asserts that the following rulings are in error: (A) The One Percent for Ordinance, SMC Ch. 30.32, is declared invalid as applied to City Light; (B) The City is prohibited from enforcing that ordinance with respect to City Light; (C) proprietary utility funds of City Light may be spent "*only* on art or art projects with a *close nexus* to the utility's primary purpose of furnishing electricity to its ratepayers . . . ." CP 1602, 1600 ¶ 2 A, B, C, App B (emphasis added).[7]

III. SUMMARY OF ARGUMENT

Plaintiffs call the One Percent for Art ordinance (App. D) "evil" because the budget is set before the art is chosen. Ignoring uncontroverted testimony on the purpose of each piece of art, the trial court gave no deference to the City's purposes in operating its utility business and erroneously invalidated the ordinance as applied only to City Light, without a stated basis, while still permitting City Light to spend utility funds on art within narrowly drawn limits, outside the One Percent program.

The trial court never addressed the fundamental question of why a utility that is a department of a first class charter city is not subject to *this* general policy, in contrast to other general policies. CP 1567 ¶ 2.

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[7] Pages 2-5 of the judgment are in the Clerk's Papers in the wrong order but are cited as the Clerk numbered the pages.

The trial court also gave no reasons for superseding the thinking of the Attorney General's office that art purchased by a utility is within the law if it has a "discernible" nexus to the utility's purpose (Ex. 274, App N), or the resulting City guidelines followed for nearly 20 years before the experts retained by these retired assistant city attorneys[8] asserted that the art ordinance is illegally applied to City Light. Nothing in the record suggests the State Auditor or Attorney General has changed opinions. Nevertheless, the trial court erroneously set narrow but confusing limits on how City Light may use art.

IV. ARGUMENT

A. The standard of review

The Court reviews conclusions of law de novo. *Perry v. Costco Wholesale, Inc.,* 123 Wn. App. 783, 792, 98 P.3d 1264 (2004). Whether an ordinance is valid is a question of law that is reviewed de novo. *DCR, Inc. v. Pierce County,* 92 Wn. App., 660, 670, 964 P.2d 380 (1998), *review denied,* 137 Wn.2d 1030 (1999), *cert. denied,* 529 U.S. 1053 (2000). A court's fundamental objective in interpreting a statute is to carry out the intent of the legislative body. *Margetan v. Superior Chair Craft Co.,* 92

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[8] No class representative plaintiff is on record, in their depositions (*e.g.,* CP 65:8-75:21) or at trial (where only Doris Burns testified, RP 4/15 22:15-28:18), as challenging One Percent for Art. On March 1, 2005, the same law firm, in the name of the two retired assistant city attorney *Okeson* plaintiffs and another former City employee, filed a new lawsuit asserting the same art fund and other violations in relation to the Seattle Public Utilities department (water, sewer, etc.). King County Cause No. 05-2-07351-9 SEA.

Wn. App. 240, 245, 963 P.2d 907 (1998). Here, that is the City Council.

Where a court is asked to review a legislative decision, the court applies the "arbitrary and capricious" standard. *Teter v. Clark County,* 104 Wn.2d 227, 234, 704 P.2d 1171 (1985). That court stated: "A legislative determination will be sustained if the court can reasonably conceive of *any* state of facts to justify that determination. . . . To be void for unreasonableness, an ordinance or resolution must be 'clearly and plainly' unreasonable." *Id.* at 234-35 (emphasis by the court). Hence, plaintiffs "have a heavy burden of proof" that the City's actions in applying the art program to City Light "were willful and unreasoning, without regard for facts and circumstances." *Id.* at 235. To be unreasonable is to be "[n]ot guided by reason; irrational or capricious." 1537 Black's Law Dictionary (7th ed. 1999). Nothing in the record meets this burden. To the contrary, all the testimony was contrary to plaintiffs' theory.

Appellate review of the evidence is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings support the conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Perry* at 792. Here, the evidence is to the contrary.

The court may review earlier rulings on summary judgment if previous orders prejudicially affect the final order to extent that

appellant's entitlement to relief under the final order is based on the earlier rulings. *Behavioral Sciences v. Great West,* 84 Wn. App. 863, 869-70, 930 P.2d 933 (1997). In this case, several points on which Seattle seeks relief were decided in the court's order denying summary judgment on art. Denial was for mixed reasons of law and fact. To the extent the trial court's decisions were based on issues of law, that order and the evidence underlying it are reviewable here. *Bulman v. Safeway, Inc.,* 96 Wn. App. 194, 198-99, 978 P.2d 568 (1999), *rev'd on other grounds,* 144 Wn.2d 335; *see also Adcox v. Children's Orthopedic Hospital,* 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993) (refusing to consider summary judgment pleadings and evidence because denial was based on factual disputes).

In denying Seattle's motion for summary judgment on art, the trial court decided that the City may not expend funds on public relations as a matter of law, and identified the utility purpose of offsetting the negative appearance of facilities as an issue of "material fact," but said that whether advertising serves a proprietary purpose when the utility is a monopoly required "further factual determination." Both the public relations and the advertising decisions were reopened for the art trial. RP 4/15 8:18-10:5. However, no decision on the use of art in advertising resulted from the trial. Therefore, the public relations, as well as the advertising, portions of the summary judgment decision should be reviewed here.

B. Seattle's art ordinance is presumed valid

Municipal ordinances, such as ch. 20.32 SMC, are presumed valid. *Heinsma v. City of Vancouver,* 144 Wn.2d 556, 561, 29 P.3d 709 (2001). The person challenging an ordinance has the heavy burden of proving that it unconstitutionally conflicts with a state statute. *Id.; Rabon v. City of Seattle,* 135 Wn.2d 278, 287, 957 P.2d 621 (1998). Enactments "that relate to the same subject and are not actually in conflict should be interpreted to give meaning and effect to both." *Margetan,* 92 Wn. App. at 245.

In *Heinsma,* the Supreme Court upheld an ordinance because it found no conflict, under state Constitution, Art. XI § 11, between Vancouver's ordinance extending health benefits to domestic partners of its employees and a state statute authorizing cities to provide health benefits to "dependents." *Id.* at 560-561, 566. The *Heinsma* principles apply with equal weight here. The trial court did not specify any statutory or constitutional conflict, and the State itself has similar art statutes.

C. Conflict with a statute is not easily found

Municipal ordinances are to be harmonized with state statutes if possible. *Heinsma* at 566. Unconstitutional conflict is found "where an ordinance permits that which is forbidden by state law, or prohibits that which state law permits." *Rabon v. City of Seattle,* 135 Wn.2d at 292. Here, neither limitation applies.

State law does not forbid having a percent for art program. For example, the State applies to State colleges and universities a one-half-of-one-percent-for-art program that is funded from construction projects. RCW 28B.10.027. The State also established a similar program for state government agencies. RCW 43.17.200, 43.46.090. If the trial court's unstated reason for finding the One Percent for Art ordinance partially invalid was based on a statutory conflict theory, the only question is whether a first class charter city may require all departments having public works projects, including utilities, to participate. If not, then an unaddressed question arises: whether a city may require a utility department to participate in *any* City-wide policy. For example, the art ordinance is part of the same chapter that says departments hiring public works contractors must require them to provide certain domestic partner benefits. SMC § 20.45.010-.050. The record contains nothing suggesting that city policies for employee benefits, architectural characteristics, behavior of hired contractors, or art should stop at the utility doorway.

D. First class charter cities are given deference to carry out their broad legislative powers

First class charter cities have broad legislative powers under the state Constitution, art. XI § 10. *Heinsma,* 144 Wn.2d at 566. The only limitations on the power of such a city is that its actions "cannot contravene any constitutional provision or any legislative enactment."

Winkenwerder v. Yakima, 52 Wn.2d 617, 622, 328 P.2d 873 (1958). Seattle therefore has as broad legislative powers as the state, except when restricted by state legislative enactments. *Id.* Grants of municipal power are to be liberally construed in favor of constitutionality. *Heinsma* at 561. Seattle thus has broad power both to adopt the One Percent for Art ordinance for all City departments and to set rates for electricity – itself a legislative act. *Earle M. Jorgensen Co. v. Seattle,* 99 Wn.2d 861, 867, 665 P.2d 1328 (1983), *cert. denied,* 464 U.S. 982. One reason for judicial deference in such a matter is "the public accountability of elected officials." *Jorgensen* at 868. Here, no evidence was provided that the art ordinance resulted in unfair, unjust, and unreasonable rates (RCW 80.28.010), or contravened any other state law.

E. Seattle has broad authority to operate a utility

RCW 35.92.050 (App E) provides legislative authority for a city to operate a municipally owned electric utility, including "full authority to regulate and control the use, distribution, and price thereof . . . ." Under this statute, selling power constitutes a business or proprietary function of a City, rather than a "general government" function. *City of Tacoma v. Taxpayers of Tacoma,* 108 Wn.2d 679, 694, 743 P.2d 793 (1987).

The City may behave as a private corporation would behave when carrying out this function: "[W]hen the Legislature authorizes a municipality to engage in a business, it may exercise its business powers very

much in the same way as a private individual." *Id.* Therefore, the Court broadly construes the City's authority to achieve its legislative objectives in connection with City Light: "Since 1910, we have . . . viewed the Legislature as implicitly authorizing a municipality to make all contracts, and to engage in any undertaking necessary to make its municipal electric utility system efficient and beneficial to the public." *Tacoma v. Taxpayers,* 108 Wn.2d at 694-95. The Court also views the express grant of proprietary authority to run a utility "as implying those 'powers . . . necessarily or fairly implied in or incident to [express powers] and also those essential to the declared objects and purposes of the [municipal] corporation." *Id.* at 695.

Finally – a point that can easily be overlooked – where a first class charter city is involved, municipal authority to conduct even a governmental function is liberally construed. *Id.* at 694 n.8. Here, the trial court failed to do so. But following *Tacoma* and *Teter,* the question this Court must answer is whether City Light's participation in the arts program is arbitrary, capricious, or a manifest abuse of discretion, *Tacoma* at 695, or unreasonable in the sense of being irrational, capricious, or absurd.

Further, because rates that a city sets for utility services are presumptively reasonable, the person challenging them has the burden of proof. *Faxe v. Grandview,* 48 Wn.2d 342, 351-52, 294 P.2d 402 (1956). City Light's participation in the One Percent for Art program varies,

depending on its budget for capital improvements within the city limits. SMC § 20.32.020-.030. There was no evidence at trial on the effect of the art program on electricity rates, past, present, or future. Consequently, there is no proof that any plaintiff was damaged by the existence of unreasonable or arbitrary rates resulting from the art program.

F. The trial court's apparent rejection of the City's broad authority to set Citywide policy is erroneous

The trial court found as a fact: "Seattle owns and operates Seattle City Light as a proprietary electric utility and as a department of the City. As a department of the City, City Light is subject to general ordinances, policies, and budget processes of the City." CP 1567 ¶ 2. This fact has not been appealed and is therefore a verity. Further, the finding is supported by the unrefuted testimony of Margaret Pageler. CP 1464:17-22, 1478:10-12. The court nevertheless concluded: "The City's One Percent For Art ordinance, SMC Ch. 20.32, is invalid as applied to the City's proprietary electric utility, City Light. Seattle shall henceforth be prohibited from enforcing its One percent For Art ordinance with respect to City Light." CP 1585 ¶ 11. This conclusion of law is not supported by finding of fact 2, or otherwise. It is therefore erroneous.

The *Okeson* court, 150 Wn.2d 540, 551-52, pointed to the principles of *Tacoma v. Taxpayers*. However, the *Okeson* court went on to determine that providing streetlights is solely a governmental function

"because they operate for the benefit of the general public, and not for the 'comfort and use' of individual customers." *Okeson* at 550. Thus, the Supreme Court gave less deference to the City's decisions on streetlights, and plaintiffs argued that the same rule should apply here.

Here, however, the trial court made no similar finding. In fact, the court did not invoke the three-part *Covell*[9] analysis used in *Okeson.* To the contrary, the court determined that City Light may choose to spend its funds on art. That decision was not appealed. Hence, art is not solely a governmental function. The decision appears to be that art becomes a "governmental function" only if (a) it is too far from the interior of a City Light office or other structure and therefore benefits people who may not be ratepayers, or benefits people in addition to City Light ratepayers and employees, or (b) it is an individual piece that did not fit the court's perception of a close utility nexus.

See, for example, Conclusion of Law 9, in which the court ruled: "City Light may not spend utility funds for the purpose of mitigating a substation's appearance, when the primary purpose of the art is to provide artistic benefit to the surrounding neighborhood and the public as a whole." CP 1584; see also CP 1600 ¶ 2C (requiring "close nexus"). The court's decision condemns the motivation of benefiting anyone besides

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[9] *Covell v. City of Seattle,* 127 Wn.2d 874, 879, 905 P.2d 324 (1995).

employees. However, substations are in neighborhoods. Mitigating the appearance of substations necessarily benefits the surrounding neighborhood and any member of the public who happens to pass by. Unrefuted testimony by Goldstein, Zarker, and Pageler described why mitigation is a legitimate utility purpose for providing an artistic benefit to the neighborhood, not solely to employees who service the substation.

For further example, the court reached a split decision about the multi-phase Skagit Streaming project, deciding that the website provides content about conservation, but rejecting the stated utility purpose of the display in the Municipal Building lobby as well as the evening downtown parking garage wall display, where both ratepayers and other citizens would see it. This result is in spite of the unrefuted testimony that both City Light and the Art Office believed they were choosing art to meet a utility function – in contrast to the *Okeson* court's determination that for streetlights, the City was engaged in a revenue-raising ploy. Here, the court's decision ignores both precedent and the evidence.

Further, the *Okeson* analysis cannot be stretched far enough to encompass a policy choice made 30 years ago that applies to all City departments. Despite plaintiffs' fervent desire, not every City budget line item can be reduced to a tax versus fee query. *Branson v. Port of Seattle,* 152 Wn.2d 862, 874 n.5, 101 P.3d 67 (2004).

G. The trial court's limits on City Light's use of art are too restrictive and are unsupported by the record

City Light's right to use art has apparently arisen only once before. There, the State suggested permissible limits defined as a "discernible nexus" to utility purposes. Ex 274 (App N). Nothing in the record suggests that the State Auditor or State Attorney General has found the City to be proceeding illegally[10] since an assistant attorney general said, in 1985:

> I have [n]ever taken the position that the city utilities may not legally expend utility funds for the purchase or placement of art. ***We bureaucrats are not necessarily such philistines as to think all utility facilities must be ugly and utilitarian.*** As you eloquently point out, there is a place for beauty and art in the administration of the utility as there is in the administration of any governmental agency . . . .
>
> . . . So long is there is a ***discernible nexus*** between the use of utility funds and the purposes for which the utility exists, I will not argue about an expenditure.

Attorney General letter No. 48315, October 7, 1985, Ex. 274, at 1-2 (App N) (emphasis added).

In the absence of direct law, this Attorney General viewpoint on the precise subject at issue, in the context of a state audit, is entitled to significant weight. *See Belas v. Kiga,* 135 Wn.2d 913, 928, 959 P.2d 1037 (1998) (giving great weight to a formal Attorney General Opinion).

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[10] Nor is there evidence that these plaintiffs ever complained to the State Auditor about art, in contrast to their streetlight rates complaint.

The Attorney General letter and the trial court's ruling that City Light may spend money on art both establish that art may have a discernible, or sufficiently close, nexus to utility functions. Whatever the precise label, the trial court erroneously set an unreasonably narrow focus for finding a "close nexus" to utility functions.[11] The question should be whether there is a reasonable relationship between the utility's purpose and the art investment. City Light should have broad discretion to decide how to carry out that purpose. Otherwise, the courts, as well as the utilities, face a future of being tied up forever in the minutia of whether any given piece of art has a sufficient utility purpose, or not.

H. The decision cannot be reconciled with the evidence

In some three trial days devoted to the subject of art, plaintiffs provided no testimony contradicting City witnesses on the purposes of City Light art. They simply argued that the stated purposes were not adequately borne out by the web pages they introduced into evidence, and that the entire art program served a general governmental purpose. The court rejected the concept that art *per se* serves a general governmental purpose. Therefore, the remaining question is whether the court wrongly decided whether particular categories or pieces of art "have a sufficient

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[11] Even the trial court used "sufficient nexus," in Finding of Fact 51, CP 1581; and plaintiffs referenced the "sufficiently close nexus" standard in opening statement, RP 4/15 15:24-16:1.

nexus to legitimate utility purposes." Finding of Fact 51, CP 1581.

It is the law of this case that City Light may purchase art to beautify its offices and customer service facilities, educate the public about conservation, and mitigate substation appearances to the extent the art is inside or upon the substation or its grounds, as well as pay maintenance costs. Conclusions of Law 9-10; see Finding of Fact 51 (listing specific art works), CP 1581-1582; and Judgment, CP 1602, 1600 ¶ 2.

The question, then, in light of the evidence, is (1) whether limitations on advertising or public relations are too restrictive, (2) whether the testimony demonstrated a sufficient utility purpose for art that witnesses identified as conveying conservation or environmental messages, (3) whether "where City Light does business" is too narrowly interpreted, and (4) whether City Light may place art offsite to mitigate its ubiquitous wires and substations. Underlying this question is the trial court's unchallenged finding that "City Light representatives work with the Office of Arts and Cultural Affairs to choose suitable art and art projects." Finding of Fact 45, CP 1579:23-24.

Advertising: Witnesses at trial and supporting summary judgment did not distinguish between advertising (for which the court wished further factual development) and public relations (on which the court ruled as a matter of law). It was clear, however, that City Light management was not

using either term in the sense of "we're the nice guys" promotion. Instead, they used "public relations" to mean a way of educating its public about conservation and other utility matters. CP 821-822 ¶ 13 (Jim Ritch); RP 5/3-II 19:15-20, 21:2-16, 24:11-17, RP 5/3-II 24:22-25:17 (Gary Zarker). All of this unrefuted testimony falls within the guidelines of WAC 480-100-223 for utilities regulated by the WUTC.[12] The court made no ruling on advertising, but rejected public relations. Both decisions are erroneous.

Education and advertising: It is established that both conservation and environmental protection have a utility purpose. *Tacoma v. Taxpayers,* 108 Wn.2d at 697. The trial court recognized the conservation purpose as one use of art. CP 1338. The court did not mention education, other than about conservation. CP 1584 ¶ 9. And from the judge's ruling that City Light may use art to educate about "conservation," it is not certain that City Light may use art to educate about anything else.

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[12] The City understands the court's ruling on advertising to be in the context of using art as an advertising medium. Some other forums have addressed utility advertising, but apparently not utility art. *E.g., WUTC. v. Pacific Power & Light Co*., 7 P.U.R.4th 470 (WUTC Nov. 20, 1974) (advertisements directed to energy conservation and the proper use of energy is beneficial to a utility's customers, and therefore an appropriate expenditure); *Alabama Power Co. v. Alabama Public Service Comm.*, 359 So.2d 776 (1978) (corporate management should be permitted to control the amount of advertising expenses incurred by the utility; the Court will not substitute its judgment for that of legislative agency fixing rates); *State v. Oklahoma Gas & Electric Co*., 536 P.2d 887 (Okla. 1975) (where the company's management is not unreasonable, or where advertising expenses are not "excessive" or "unwarranted," they should be allowed as an operational expense).

It is also established that utilities have implied powers to carry out their purposes. *Hite v. Public Util. Dist. No. 2*, 112 Wn.2d 456, 458-59, 772 P.2d 481 (1989). By analogy to the scope given utilities that are subject to regulation by the WUTC, it is also implied that certain uses of art in educational advertising, including promotional advertising, is permissible for City Light. WAC 480-100-223 (App P) (allowing regulated utilities to advertise to inform customers how to conserve energy or reduce peak demand, and promote the use of energy-efficient appliances, equipment, or services. § 223(2).[13]

Where City Light does business: City witnesses did not take a narrow view of where City Light does business or has facilities. Mr. Zarker, for example, testified at trial that the system is not just substations and generation plants; it is the wires on the streets. RP 5/3-II 18:16-19:2. Ms. Goldstein testified similarly, and added that City Light personnel visit various City offices. RP 4/15 108:11-20; 4/19 169:21-170:18. Ms. Pageler agreed. CP 1502:15-21. But the trial court rejected the uncontroverted

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[13] Unlike the facts in *Jewell v. WUTC,* 90 Wn.2d 775, 585 P.2d 1167 (1978), City Light is not contributing to charities, or to community art programs. The art in question remains an asset of City Light, and may appreciate in value. Finding of Fact 45, CP 1579:25-1580:2. In the same vein, the facts are different in *Kightlinger v. Pub. Util. Dist. No. 1*, 119 Wn. App. 501, 81 P.3d 876 (2003), *review granted,* 152 Wn.2d 1001, in which a utility had a side business of repairing appliances. City Light uses art for purposes of its core business. *Kightlinger* also concerned the powers of a public utility district, not the broad powers of a first class charter city. *Des Moines Marina Assn. v. Des Moines,* 124 Wn. App. 282, 294 n.17, 100 P.3d 310 (2004)

evidence and ruled that City Light may not purchase or own art that is outside the utility's downtown office space, its north and south service centers where there are both employees and customer-payment counters, and its substation walls and grounds, or its large facilities such as the Skagit and Boundary dams.

The result is to determine that City Light may use art to educate its own employees, as well as any ratepayer who visits a City Light office, about conservation, but it may not educate anyone else, especially if the general public might also benefit. Such a result cannot be reconciled with the trial court's decision that City Light may educate about conservation.

Mitigation: As discussed, several witnesses testified, at trial and supporting summary judgment, to the ubiquitous nature of City Light facilities, including the poles and wires lining most streets. Most of the substations, poles, and wires are indisputably ugly. City neighborhoods, whether occupied by ratepayers or not, bear both the benefit (electricity) and the burden (ugliness) of these facilities. Witnesses testified that neighborhood representatives seek out City Light art for mitigation, and that the utility's business is made easier by providing mitigation. In short, mitigation suits City Light's purposes.

The court drew the limit of mitigation too narrowly. No evidence refutes City Light's purpose in funding, for example, part of the lighted

sculptures on the Ballard Bridge (App Q). But the court decided that even art that is adjacent to, rather than upon, a vacant City Light lot – *e.g.,* Wave Rave Cave – does not serve a legitimate utility purpose of mitigating the neighborhood impact of its long-term vacant lot. RP 4/19 70:10-23. If any limit is set on City Light's choice of how to mitigate its own facilities, that limit should require only that the utility be able to show that City Light and the neighborhood view art as mitigation.

Public display: Under the ruling, City Light art may not be displayed in other public buildings, or in "permanent or traveling exhibits," CP 1584 ¶ 9, because in those locations, it is of benefit to the general public, as well as to ratepayers and City Light employees. But there is no reasonable basis for imposing distinctions on City Light's purposes that the utility itself does not make. The decision is in contrast to the right to display university-owned art in non-campus public settings, as well as to lend art more broadly than this court allows at CP 1584 ¶ 9. RCW 28B.10.027. The court's decision ignores the testimony of Margaret Pageler that utility art should be displayed more broadly, such as in neighborhood service centers and the mayor's office, where customers go. CP 1500:24-1501:3. The decision also ignores testimony of several witnesses that City Light employees do business throughout City offices. While it may be reasonable to order that City Light not place its art in

another entity's permanent display, it is unreasonable to place greater limits on City Light than the state places on public universities.

Conclusion: The trial court's approach results in a piece by piece second-guessing of which art serves an approved nexus. More properly, however, City Light's view of how it uses art as a medium for reaching out to the public should be given the deference due to those conducting a proprietary business, in the absence of any challenge by the state auditor.

I. For want of a placard, was the art lost?

The trial judge questioned the absence of an educational plaque at McCaw Hall, based on personal experience, saying that while it "may be visually appealing, there's nothing that I remember seeing that tells me this demonstrates low-energy light." RP 4/20 18:17-22. But an inadequate placard is a basis for ordering better communication of City Light's ownership and purpose, not for invalidating an ordinance. To the extent the decision on McCaw or Benaroya halls or other public displays was based on failure to convey City Light's conservation message, the appropriate remedy would be an order to prepare better placards.

J. The trial court's order to transfer funds is unreasonable

Having limited City Light's ownership and maintenance of art, the court ordered that all other artwork and amounts, including City Light funds held in the Municipal Art Fund, be transferred from the General Fund to the Light Fund. CP 1585 ¶ 10, 1602 ¶ 2. The parties stipulated to

the time and manner in which that would occur, pending the outcome of appeal. CP 1628-1632. But there is no evidence that the City knowingly violated the limits of legislative or utility authority, or that the art in question has benefited the general fund so that its cost should be considered a tax refundable by the City. Almost no decision touching on these matters has been located in any jurisdiction.[14] The trial court made no ruling on "tax" or "benefit." It is unreasonable to try to unwind the past three years of City Light's 30 years of participation in One Percent for Art. To the extent the trial court ordered otherwise, it is in error.

V. CONCLUSION

Both plaintiffs and the court focused on each specific piece of art, and while appreciation of art is admittedly highly personal, the result was that they lost focus on the "forest," that is, the categories of utility purpose into which the art falls. One is the choice to beautify certain spaces with anything from a Jacob Lawrence to a photograph of a turbine. Another is the choice to mitigate ugly, but essential, infrastructure with art that reaches out to different constituents or communities among ratepayers

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[14] The one case involving an art requirement that we have found is a California Supreme Court case in which that court upheld a municipal building code requirement of Culver City imposing an "art in public places" fee of 1% of the total building valuation on private development. "The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose." *Ehrlich v. City of Culver C*ity, 12 Cal.4th 854, 866, 911 P.2d 429, 50 Cal.Rptr.2d 242, *cert. denied,* 519 U.S. 929 (1996).

and citizens. A third is to use art to provide educational or environmental messages. Only the third category requires that the art show a direct relationship to what City Light does. Thus, "Skagit Streaming" requires a reasonable – not exacting – relationship to City Light's effect on salmon streams, but "Wave Rave Cave" should require only a mitigation purpose.

A trial that focuses on each piece of art inevitably confuses taste in art with the owner's goals in having the art. Here, the unfortunate result is a decision that partially overturns an ordinance without stating a reason and that far too narrowly limits City Light's purposes in funding art.

As the Washington Supreme Court said in *Tacoma v. Taxpayers* when rejecting limitations on a utility approach to conservation, "much has changed." There, the change concerned acknowledgment of the role of conservation as an energy resource. 108 Wn.2d at 688-89. Plaintiffs on the other hand seek to keep City Light locked in the age of "bureaucratic philistines." This use of art for utility purposes is part of the evolution of the responsibility of utilities, whether private, public, or municipal, to become environmentally and aesthetically responsible and efficient in a variety of ways. But the trial court has overturned a valid ordinance and placed undue limitations on City Light's ability to carry out those responsibilities. The ruling should be reversed.

Dated this ___ day of April 2005.

Respectfully submitted,

THOMAS A. CARR
Seattle City Attorney

By: _____
William H. Patton, WSBA #5771
Rebecca C. Earnest, WSBA #13478
Attorneys for the City of Seattle

APPENDIX

A. Findings of Fact and Conclusions of Law (May 21, 2004)

B. Partial Judgment Pursuant to CR 54(b) (October 8, 2004)

C. RCW 43.09.210

D. Ch. 20.32 SMC

E. RCW 35.92.050

F. Order Denying Seattle's Motion for Partial Summary Judgment To Dismiss Allegations Related to "One Percent for the Arts" (March 31, 2004)

G. Municipal Art Plan, 2001-2002 (Ex 45)

H. Electric Gallery (Ex 62)

I. Creston Nelson Substation project (Ex 65).

J. Wave Rave Cave (Ex 67)

K. Skagit Streaming (Ex 72)

L. Dreaming in Color (Ex 288)

M. Speaker Stick (Ex 346)

N. Letter from the office of the Attorney General (Ex. 274)

O. Temple of Power and Oculus Portals (Ex 67)

P. WAC 480-100-223

Q. Ballard Gateway (Ex 70)